Supreme Court, U. S.
FILED
MAY 22 1974
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

JOE RESWEBER
County Attorney
Harris County, Texas

EDWARD J. LANDRY
Senior Assistant County Attorney

MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151
Attorneys for Appellants

Date: May 22, 1974

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

INDEX

	Page
ARGUMENT AND AUTHORITIES	1
1. Subparagraph (g) of Rule 15, Supreme Court Rules, is not applicable to this appeal, and even if it were, Appellants' Jurisdictional Statement is nevertheless in full compliance therewith	1
2. The Order of the Commissioners Court redistricting the County's eight justice precincts in no way abridged any citizen's right to vote	2
3. Appellees lack standing to urge any invalidity of the redistricting in question on the basis that it allegedly fails to comport with the "one man-one vote" principle	5
4. The different treatment accorded by Article 2351½ to county commissioners on the one hand and justices of the peace on the other is not a legislative distinction that is either arbitrary or invidious	9
5. Appellees' claim of gerrymandering for purposes of racial discrimination is totally groundless	10
6. The validity of Article 2351½(c) has never been passed on by the Texas Supreme Court in any case, including that of *C. R. Davis v. Steven C. Oaks*, No. B-4542 (17 Sup. Ct. Journal 256), as urged by Appellees	11
7. The conclusion of Texas Attorney General advisory opinion No. H-220, January 29, 1974, is not the law of Texas, having been reached in erroneous reliance on the Texas case of *McGuire v. Hughes*, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX	17

TABLE OF CITATIONS

CASES

	Page
Avery v. Midland County, Texas, 390 U.S. 474	5, 7, 8
Baker v. Carr, 369 U.S. 186	5
Barrett v. Atlantic Richfield Co., 444 F.2d 38	8
Buchanan v. Rhodes, 249 F.Supp. 860, appeal dism. 385 U.S. 3	6

CASES

	Page
City of Meridian v. Southern Bell Tel Co., 358 U.S. 639	7
Davis v. Oaks, No. B-4542 (17 Tex. Sup. Ct. Journal 256)	11, 12
Grant v. Ammerman, 451 S.W.2d 777 (Tex. Civ. App. 1970, err. ref. n.r.e.)	14
Harman v. Forsseniuns, 380 U.S. 528	8
Higginbotham v. City of Baton Rouge, La., 306 U.S. 535	3
Kail v. Rockefeller, 275 F.Supp. 937	6
McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)	12, 14
Reynolds v. Sims, 377 U.S. 533	5
Romero v. Coldwell, 455 F.2d 1163	7
Snowden v. Hughes, 321 U.S. 1	3
State ex rel. Dowlen v. Rigsby, 43 S.W. 271 (Tex. Civ. App. 1897, err. den. 43 S.W. 1101)	3
Taylor v. Beckham, 178 U.S. 548	3
Williams v. Castleman, 247 S.W. 263 (Tex. Sup. Ct. 1922)	5
Wisconsin v. Constantineau, 400 U.S. 433	8
Wright v. Rockefeller, 376 U.S. 52	11

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Rule 15, Supreme Court Rules	1
Article V, Section 19, Vern. Ann. Tex. Const.	8
Article 2351½ Vern. Ann. Tex. Civ. Stat.	2, 4, 9, 11, 12, 13, 14
Article 2385, Vern. Ann. Tex. Civ. Stat.	8
Article 2460a, Vern. Ann. Tex. Civ. Stat.	8
Article 4.11, Vern. Ann. Tex. Code of Crim. Proc.	8
Article 4.12, Vern. Ann. Tex. Code of Crim. Proc.	8
Article 45.22, Vern. Ann. Tex. Code of Crim. Proc.	8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1475

HARRIS COUNTY COMMISSIONERS COURT, ET AL., *Appellants*

v.

RICHARD E. MOORE, ET AL., *Appellees*

On Appeal From The United States District Court For The Southern District of Texas, Houston Division

---

APPELLANTS' RESPONSE TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

Appellants respectfully submit the following in response to the Appellees' Motions To Dismiss or Affirm.

ARGUMENT AND AUTHORITIES

1. Subparagraph (g) of Rule 15, Supreme Court Rules, is not applicable to this appeal, and even if it were, Appellants' Jurisdictional Statement is nevertheless in full compliance therewith.

Appellee Zaboroski contends first that this appeal should be dismissed on the ground that Appellants have failed

to comply with Rule 15 of the Supreme Court Rules, which requires that in an appeal from a decree of a district court granting an "interlocutory injunction," an appellant's jurisdictional statement must "include a showing of the matters in which it is contended that the court has abused its discretion by such action." Such contention is wholly without merit for the reason that the District Court's injunction was not interlocutory, but as Appellee himself points out at page 2 of his brief, and as clearly revealed by the District Court's Judgment Order set out at page 34 as Exhibit A of Appellants' Jurisdictional Statement, such injunction was permanent. In any event the reasons and supporting authorities therefor set out in Appellants' Jurisdictional Statement amply support the proposition that the District Court did indeed abuse its discretion in declaring the Texas statute, Article 2351½ V.A.C.S., to be "facially unconstitutional" and in decreeing that the order of the Commissioners Court of Harris County, Texas, of June 28, 1973, redistricting the County's eight justice of the peace and constable precincts, be "permanently enjoined."

2. The Order of the Commissioners Court redistricting the County's eight justice precincts in no way abridged any citizen's right to vote.

To Appellee Zaboroski's contention that "Article 2351½ deprives the voters of their equal protection rights, in that the right to vote for Justices of newly created precincts is guaranteed in some precincts and arbitrarily denied in others." Appellants would respond by saying that in the recently held party primaries on May 4, 1974, the two positions for justice of the peace in all eight of the County's justice precincts were on the ballot and up for election, and all citizens in each of the precincts were

entitled to vote for the candidates of their choice in their respective precincts. Appellee Zaboroski was indeed himself on the ballot as a candidate for justice of the peace of Precinct 4, Position 1, and was elected as his party's nominee for such position.

To said Appellee's claim that his right and that of the others to hold office has been unconstitutionally abridged by "complete ouster without cause or due process," Appellants would again cite to the Supreme Court the decisions of *Taylor v. Beckham,* 178 U.S. 548, in which it is declared that "In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office;" *Higginbotham v. City of Baton Rouge, La.,* 306 U.S. 535, in which it is declared that "the legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service;" and *Snowden v. Hughes,* 321 U.S. 1, under which the right to continue in office which Appellees assert is clearly within those "rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law," as distinguished from those rights of a citizen derived from his national citizenship.

In this latter regard Appellants would also again cite to the Court the language in *State ex rel. Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Civ. App. 1897, application for writ of error denied by the Texas Supreme Court at 43 S.W. 1101, for the reason that the case was "correctly decided in the court of civil appeals"), to the effect that

". . . the power to establish the precincts does not necessarily conflict with the provisions fixing the terms of office. They must stand together. The office is taken subject to the power to change the boundaries of the precincts. * * * While the office is property, it is held subject to the proper exercise of all such powers as these. There is no contract between the state and its officers which forbids such actions." See Appellants' Jurisdictional Statement, pages 11-13.

That there was ample justifiable cause for the effect of Article 2351½ vacating the offices of the five office holding Appellees in this case is clearly borne out by the critical need to eliminate to as great an extent as practicable the severe malapportionment of the old precincts, which had not been reapportioned since 1876, coupled with the compelling state interest of requiring that the precinct officers in question reside in the precinct in which they serve.

In addition, the due process of which Appellees complain they were deprived was fully available to them by virtue of the many highly publicized public meetings held by the redistricting committee of nine persons appointed to study the question and of those involving the deliberations of the Commissioners Court, including those held at meetings prior to the meeting on June 28, 1973 at which the redistricting order in question was passed. Further, Appellees clearly could have invoked the due process afforded them by state constitutional Article 5, Section 8 and state statutory Article 1908, which vest in a Texas District Court the "appellate jurisdiction and general supervisory control" over the Commissioners Court, to determine whether such body acted in a manner

amounting to a gross abuse of power or in a manner fraudulently or grossly arbitrary to the detriment of the Appellees. *Williams v. Castleman,* 247 S.W. 263 (Tex. Sup. Ct. 1922). See page 13 of Appellants' Jurisdictional Statement.

3. Appellees lack standing to urge any invalidity of the redistricting in question on the basis that it allegedly fails to comport with the "one man-one vote" principle.

Aside from the fact that the District Court did not treat of the question of the applicability of the "one man-one vote" principle to the particular kind of political subdivision in question, the Appellees lack standing to complain that the redistricting in question might not have met the mathematical preciseness of this doctrine. All six of the Appellees reside in new Precinct 4. Such precinct, with a population count of 175,769, is the third smallest, population-wise, of the eight new precincts. Surely, they cannot be heard to say that they are aggrieved by the fact that the Commissioners Court might not have adhered to the "one man-one vote" principle in redistricting the eight precincts in question. Their right to vote cannot be said to be "debased" or "diluted" by reason of the unequal population counts of such precincts. *Avery v. Midland County, Texas,* 390 U.S. 474; *Reynolds v. Sims,* 377 U.S. 533; *Baker v. Carr,* 369 U.S. 186.

Even if it could be said that Appellees could be heard to complain on this point, it is submitted that such constitutional principle is not even in any way applicable to the type of districts or precincts of which justices of the peace and/or constables hold their offices therein.

In *Kail v. Rockefeller,* 275 F. Supp. 937 (1967), a case in which it was contended that there was a malapportionment of state judges as between counties in a certain judicial district, the Court, in dismissing the complaint on the ground that the issue as to how judges should be distributed was of a peculiarly state political nature, declared:

> "Within the year, other attempts have been made to have federal courts invade State territory and usurp State powers. In Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio, E.D. 1966), appeal dismissed, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966) the plaintiffs there sought to attack the Ohio Constitution which provided for one Common Pleas judge for each county. The county population disparity was substantial. The problem was quite similar to that presented here and the self-answering questions cannot be better stated than by Chief Judge Connell who said:
>
> "*We are surprised that the plaintiffs would have us reapportion only the judges* in the trial courts of the state. *Should we not also reapportion the number of sheriffs and their deputies* so that litigants in heavily populated counties will have an opportunity to secure quicker service of process? *Should we not also reapportion the number of clerks of court and their deputies* so that litigants in heavily populated counties will have more expeditious processing of the paper work involved in litigation? Since the prejudicial delay is also caused by a paucity of trial lawyers, *shall we, considering lawyers as officers of the court* (to satisfy the 'state action' requirement for invoking the Fourteenth Amendment), *reapportion their number among the eighty-eight counties of Ohio?* And if this Court can affect the destinies of men by amending an entire judicial structure,

what of mere brick and mortar? *Should we not also reapportion the number of courthouses and courtrooms* in the various counties? These questions supply their own answers. (249 F. Supp. p. 862)." (Emphasis Supplied)

In *Romero v. Coldwell,* 455 Fed. 2d 1163 (1972), suit was brought expressly for a determination of whether the "one man-one vote" concept applied to Justices of the Peace in Texas counties. The District Court had dismissed the Plaintiffs' cause on the ground that *Avery v. Midland County,* supra, had no application. The Fifth Circuit Court of Appeals declared:

"The petition alleged that El Paso County is divided into eight justice of the peace precincts each precinct having one justice of the peace except for one precinct which has two, and that the precincts are widely varying in population, with the result that the votes of persons in the more populous precincts are diluted. The petition contained no allegations describing the jurisdiction of justices of the peace in El Paso County. However, in this court appellants contend that each justice of the peace has county-wide jurisdiction, and they acknowledge that this is the linchpin of their case. *It appears that this is a question that is neither settled nor clear under Texas law. We affirm the dismissal on the ground of abstention rather than on the ground stated by the trial judge, but modify it to provide it is without prejudice."*

* * *

". . . *decision of unsettled state law by the state courts in the first instance 'is especially desirable where the questions of state law are enmeshed with federal questions;'* City of Meridian v. Southern Bell Tel. Co., 358 U.S. 639, 640, 79 S.Ct. 455, 3 L.Ed.2d

562, 563 (1959), unless the state statute is clear and unambiguous in all respects and does not render decision of the constitutional question unnecessary, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), Harman v. Forssenius, 380 U.S. 528, 35 S.Ct. 1177, 14 L.Ed.2d 50 (1965).

* * *

"Clarity and unambiguity are lacking with respect to territorial jurisdiction of a Texas justice of the peace, given the disparity between C.C.P. arts. 4.12 and 45.22 which speak in terms of government units and C.C.P. art. 4.11, Tex. Rev. Civ. Stat. Ann. arts. 2385, 2460a, and Texas Const. art. V, § 19, all of which go to subject matter jurisdiction. *It is possible that the Texas Courts may flesh out the bare bones of the constitution and statutes by finding the boundary of the jurisdiction of a justice of the peace coincident with the precinct from which he is elected rather than county-wide.*

* * *

"*. . . thus, dismissal by the federal court is appropriate in order that the plaintiffs may proceed in the Texas courts if they wish but the dismissal must be without prejudice.* Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971)." (Emphasis supplied)

Finally, it is submitted that justices of the peace and constables, unlike the county commissioners dealt with in *Avery v. Midland County, Texas,* supra, do not exercise general governmental powers over the entire geographic area of the county. Thus the "one man-one vote" principle enunciated in the many prior cases on this question has no application to such districts as the justice of the peace and constable precincts in question.

4. The different treatment accorded by Article 2351½ to county commissioners on the one hand and justices of the peace and constables on the other is not a legislative distinction that is either arbitrary or invidious.

Appellees complain that Article 2351½ arbitrarily and irrationally discriminates between justices of the peace and constables on the one hand and county commissioners on the other, favoring the latter. It is contended that since section (b) of the statute provides that the terms of county commissioners are not to be affected by a change in a redistricting of commissioner precincts, section (c), in effecting a vacancy or vacancies in the justice of the peace and constable positions where after a redistricting there reside in a particular precinct or precincts an excessive number of such officers for the limited number of positions authorized therein, discriminates against justices of the peace and constables. Appellees' argument overlooks the fact that commissioners are not officers of the particular precincts from which they are elected; they are county officers serving the entire county. Even though a redistricting places a commissioner's residence outside of the precinct from which he was elected, his residence still is within the political unit, to-wit, the county, which he was elected to serve. This is not so with justices of the peace and constables. A redistricting which leaves these officers outside of the precinct from which they were elected, obviously places them outside the political unit which they were elected to serve, to-wit, the justice or constable precinct. This legislative distinction is a wholly reasonable one in the light of the residency requirement of Texas Election Code Article 1.05, set out at page 44 of Appellants' Jurisdictional Statement. See also *Whitmarsh v. Buckley*, 324 S.W.2d 298 (Tex. Civ. App. 1959, no

writ history) at pages 17 and 20 of Appellants' Jurisdictional Statement.

5. Appellees' claim of gerrymandering for purposes of racial discrimination is totally groundless.

Appellees, both in the trial court and on this appeal, contend that the Commissioners Court employed "racial reasoning" in realigning the eight precincts in question to create a "safe" precinct for blacks and one such precinct for Mexican Americans. Such a claim is based on the fact that blacks comprise 58.4% and Mexican Americans 5.5% of new Precinct 7 and Mexican Americans comprise 35.2% and Blacks 29.0% of new Precinct 6 (Exhibit No. 11 to Stipulation of the Parties—See Paragraph No. 15 of the Stipulation at page 218 of the Record). As a result of the large percentage of Blacks in Precinct 7 the Commissioners Court appointed two Blacks as justices of the peace and one as the constable for such precinct. As a result of the large percentage of the Latin Americans in Precinct 6, the Commissioners Court appointed two of their race as justices of the peace and one as constable of such precinct.

The appointment of Blacks and Mexican Americans to these posts of justice of the peace and constable represent the first time ever in the history of Harris County, Texas, that members of these two races have held such offices. A consideration such as promoting the participation of minorities in the political structure of county government would seem to a laudatory one, but Appellees would have the Court view such as evil and invidious discrimination. The deposition testimony of County Judge Bill Elliott and County Commissioners Bass and Bray, detailing the many reasons motivating the Com-

missioners Court's realignment of the precincts, summarized at page 5 of Appellants' Jurisdictional Statement, clearly support a conclusion contrary to Appellees' claim in this matter. See *Wright v. Rockefeller,* 376 U.S. 53.

6. The validity of Article 2351½(c) has never been passed on by the Texas Supreme Court in any case, including that of C. R. Davis v. Steven C. Oaks, No. B-4542 (17 Tex. Sup. Ct. Journal 256), as urged by appellees.

In *Davis v. Oaks,* Davis was the constable of old Precinct 4 in Harris County prior to the redistricting order of June 28, 1973. After the redistricting and as a result of it, three constables of various of the former precincts ended up residing in new Precinct 4. The position of constable for this new precinct was therefore considered vacated by the effect of Article 2351½(c). The Commissioners Court then pursuant to Article 2355, V.A.C.S., proceeded to fill such vacancy by appointment, appointing Davis. As a result of the requirement of said Article 2355 that an appointee must run at the next succeeding General Election following his appointment to office, the position was put on the ballot for the Democratic party primary after one Eddings announced his candidacy therefor. Davis then filed his candidacy for said office.

Thereafter, Davis, represented by counsel for Appellees Moore et al. herein, filed suit in state District Court against Oaks, the Chairman of the County Executive Committee of the Democratic Party, seeking a mandamus to compel Oaks to remove the position from the ballot on the ground that he, Davis, had been elected as Constable of Precinct 4 in 1972 for a four-year term, and that he was entitled to serve out the remainder of such

term without undergoing the 1974 General Election process, notwithstanding the redistricting which materially changed the makeup of such precinct.

The State District Court, without rendering an opinion, denied the application for mandamus. On appeal, the Texas Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at Houston, in an opinion as yet unreported but appended hereto as Exhibit A, dismissed the case as moot for reasons set out therein.

Thereafter, Davis filed in the Texas Supreme Court, in an original proceeding therein as authorized by Article 1735a, V.A.C.S., a motion for leave to file a petition for writ of mandamus. The Texas Supreme Court on April 3, 1974, without a hearing and without issuing an opinion, entered an order noting simply, "motion for leave to file petition for writ of mandamus was this day overruled." Thus the case of *Davis v. Oaks* cannot in any way be said, as Appellees would have it, to be a case in which Article 2351½(c) has been authoritatively construed by the Texas Supreme Court for the benefit of the bench and bar of Texas.

7. The conclusion of the advisory opinion of the Attorney General of Texas, Opinion No. H-220, January 29, 1974, is not the law of Texas, having been reached in erroneous reliance on the Texas case of McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history).

In *McGuire v. Hughes*, copy of the opinion being appended hereto as Exhibit B, McGuire had been elected one of two justices of the peace in a two justice precinct in 1960 for a four year term beginning January 1, 1961. His position was Precinct 1, Place 1. He was re-elected

to the position in 1964 for a four year term beginning January 1, 1965.

In January of 1967 the Commissioners Court abolished the position of justice of the peace, Place 2 in said justice precinct. In 1968 McGuire was re-elected to the position of justice of the peace, Place 1 for another four year term beginning January 1, 1969.

On January 13, 1969, the Texas Secretary of State ruled that inasmuch as the Commissioners Court had abolished the justice position of Place 2 in the precinct, the precinct was a single justice precinct, the term of which justice under the Texas constitutional time table for terms of office, set out in Article 16, Section 65 (Exhibit C hereto) would end December 31, 1970, and the office would thus be on the ballot for the General Election of 1970, notwithstanding that McGuire would have two more years of office having been elected in 1968 for a four year term.

In granting McGuire's application for mandamus to have the office removed from the ballot in the party primary for the 1970 General Election, the Texas Court of Civil Appeals simply held that "The fact that the Commissioners Court of Grayson County abolished the Office of Justice of the Peace, Precinct 1, Place 2, in 1967, does not, in our opinion, have the legal effect of reducing the constitutional four year term of Justice of the Peace, Precinct 1, Place 1, Grayson County to two years."

The Court was not confronted with any kind of re-districting or realigning of the precinct lines and the applicability of Article 2351½(c) did not in any way come into question. Nor was there any question of the

applicability of Article 1.05, Vern. Ann. Tex. Election Code, relating to precinct residency requirements. Of significance also, as the Court pointed out, Article 5, Section 18 of the Texas Constitution requires "that in any precinct in which there may be a city of 8,000 or more inhabitants, there *shall* be elected two justices of the peace. It is stipulated that Precinct 1 of Grayson County, Texas contains a city, namely Sherman, which has more than 8,000 inhabitants." Thus, the Commissioners Court of such County really had no authority under the Texas Constitution to abolish one of the justice positions in the first place. See *Grant v. Ammerman*, 451 S.W.2d 777 (Tex. Civ. App. 1970, err. ref. n.r.e.).

McGuire v. Hughes is thus clearly distinguishable, both on the facts and the law, from the factual situation and the legal question propounded to the Texas Attorney General in his advisory opinion No. H-220, upon which Appellees so strongly rely. It is respectfully submitted that because the writer of Texas Attorney General Opinion No. H-220 erroneously relied on *McGuire*, the conclusion of such opinion is not the law of Texas. In any event the Texas Supreme Court should be given the opportunity to give the final pronouncement of what the law of Texas is on this matter.

CONCLUSION

It is again respectfully urged that the District Court erred in declaring the Texas statute Article 2351½ to be facially unconstitutional and in permanently enjoining the Harris County Commissioners Court's order of June 28, 1973, redistricting the County's justice of the peace and constable precincts; and that the questions presented by this appeal are substantial and of public importance, for

which reasons it is prayed that probable jurisdiction be noted.

Respectfully submitted,

JOE RESWEBER
County Attorney
Harris County, Texas

By Edward J. Landry
EDWARD J. LANDRY
Senior Assistant County Attorney

By Michael R. Davis
MICHAEL R. DAVIS
Assistant County Attorney
202 Harris County Courthouse
Houston, Texas 77002
(713) 228-8311, Ext. 151
Attorneys for Appellants

CERTIFICATE OF SERVICE

(1) The undersigned counsel for the Appellants do hereby certify that on this 27th day of May, 1974, they did deposit in the United States Mail, by Registered Mail, Return Receipt Requested, addressed to each of the following appellees' Attorneys at the address shown, three (3) true and correct copies of this instrument, entitled, "Appellants' Response To Appellees' Motions To Dismiss Or Affirm."

VIRGIL H. BARFIELD
Attorney in Charge
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

C. ANTHONY FRILOUX, JR.
Attorney in Charge
For Appellee Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

JOHN G. GILLELAND
Of Counsel
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

GERALD A. WOOLF
Of Counsel
For Appellee Gene Zaboroski
1215 First National Life Bldg.
Houston, Texas 77002

DAVID HOLLINGSWORTH
Of Counsel
For Appellees, Richard E. Moore, et al
500 Houston Bar Center Bldg.
Houston, Texas 77002

LARRY B. KERFOOT
Attorney in Charge
For Appellee Blackie Neeley
910 Houston Bar Center Bldg.
Houston, Texas 77002

JOHN M. O'QUINN
Attorney in Charge
For Intervenor-Petitioners
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

WESLEY H. HOCKER
Attorney in Charge
For Intervenor-Petitioners
Harris County Democratic Executive Committee
1020 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

(2) All parties required to be served have been served.

Signed:

Edward J. Landry

EDWARD J. LANDRY
Senior Assistant County Attorney

Michael R. Davis

MICHAEL R. DAVIS
Assistant County Attorney
Attorneys for Appellants

APPENDIX

This appendix contains the following listed exhibits:

Exhibit A—Opinion of the Texas Court of Civil Appeals for the 14th Supreme Judicial District, at Houston, in the case of Davis v. Oaks, No. 1006, as yet unreported

Exhibit B—Opinion of the Texas Court of Civil Appeals for the 5th Supreme Judicial District, at Dallas, in the case of McGuire v. Hughes, 452 S.W.2d 29 (Tex. Civ. App. 1970, no writ history)

Exhibit C—Article 16, Section 65 of Vernon's Annotated Texas Constitution

EXHIBIT A

Case Dismissed as Moot, and Opinion filed March 20, 1974.

NO. 1006

C. R. DAVIS, Appellant

vs.

STEVEN C. OAKS, ET AL, Appellees

Appeal from 133rd District Court
of Harris County

This is an attempted appeal by C. R. Davis from a judgment of a district court of Harris County denying what he calls his petition for writ of mandamus.

The appellant, Davis, was elected in 1972 to the office of Constable, Precinct No. 4, Harris County, Texas. The term to which he was elected began January 1, 1973, and was to continue through December 31, 1976. On June 28, 1973, the Harris County Commissioners Court redistricted the constable precincts of Harris County. The new Precinct No. 4 consisted of all of old Precincts 4, 5, and 7 and parts of 3 and 6. There were three persons, including Davis, residing in the new Precinct 4 who had been Constable of an area included therein. The Commissioners Court of Harris County, effective July 1, 1973, appointed Davis as Constable of the new Precinct 4. This action was pursuant to Tex. Rev. Civ. Stat. Ann. art. 2351½ (1971).

Both Davis and Larry Eddings have filed as candidates for the Democratic nomination for the office of Constable of Precinct 4 in the primary election to be held on May 4,

1974. No one filed as candidate for such nomination in the Republican party. Steven Oaks, Chairman of the Democratic Executive Committee, has certified to the County Clerk a list of candidates, which list includes both Davis and Eddings as candidates for the office of Constable, Precinct 4, Harris County.

Davis filed suit in the district court against Oaks, Eddings, and R. E. Turrentine, Jr., County Clerk of Harris County. He prayed for issuance of a writ of mandamus "ordering and commanding the Defendants to remove the office of Constable, Precinct No. 4 of Harris County, Texas, from the ballot during the Democratic Primaries set for May 4, 1974." After a hearing in which the facts were stipulated, the trial judge on March 11, 1974, denied the relief sought by Davis. Davis appealed to this Court, and the parties agreed that the appeal be preferentially set for March 19, 1974.

It is the appellant's position that he was, in 1972, elected to a four-year term as Constable of Precinct 4 and that there is not, and will not be until January 1, 1977, any vacancy in that office. For the reasons hereinafter stated, we are unable to pass on the merits of that contention.

The first primary is to be held on May 4, forty-one days from this date. Absentee voting in that election will begin on April 22, twenty-nine days from this date. The Chairman of the Harris County Democratic Executive Committee has announced his intention of letting a contract for the printing of the ballots to be used in such election on March 25, five days from this date. The drawings for positions on the ballot have already been held.

If we were to decide the merits of the case, the losing side would have fifteen days, until April 12, in which to file a motion for rehearing. Assuming that motion was overruled at once, the losing party would have thirty days thereafter in which to file application for writ of error—until May 13, after the primary.

It can readily be seen that the losing side could not, if we were to decide the merits of this appeal, follow the appellate procedures available to that side without sacrificing some of the time given by the Texas Rules of Civil Procedure. We, therefore, on the authority of McGee v. McKaskle, 499 S.W.2d 755 (Tex. Civ. App. —Houston [1st Dist.] 1973; no writ), and the authorities cited therein, dismiss this case as moot.

Per Curiam

Judgment rendered, and opinion filed March 20, 1974.

EXHIBIT B

A. L. McGUIRE, Relator,

v.

CHARLES E. HUGHES, Repondent.

No. 17477.

Court of Civil Appeals of Texas, Dallas.
Feb. 24, 1970.

Proceeding for writ of mandamus directing party county chairman to omit from official ballot of primary election the office of justice of the peace. The Court of Civil Appeals, Claude Williams, J., held that fact that Commissioner's Court of Grayson County abolished office of justice of the peace, Precinct 1, Place 2, in 1967, did not have effect of reducing constitutional four-year term of justice of the peace, Precinct 1, Place 1, Grayson County to two years, and term of office of justice of the peace, Precinct 1, Place 1, Grayson County to which incumbent was elected in 1968, was for a period of four years, ending December 31, 1972.

Writ granted.

CLAUDE WILLIAMS, Justice.

This is an original proceeding wherein Relator A. L. McGuire asks us to issue a writ of mandamus directing the Respondent Charles E. Hughes, Democratic County Chairman of Grayson County, Texas, to omit from the official ballot of the primary election of the Democratic Party in Grayson County, Texas, to be held on May 2,

1970, the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas.

A. L. McGuire is the duly elected and acting Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas. Respondent Charles E. Hughes is the duly elected and acting Democratic County Chairman of the Democratic Party Executive Committee of Grayson County, Texas.

Relator was elected to the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, in 1960, for a term of four years, which he served. In 1964 he was re-elected for another four-year term, which he served. By order dated January 24, 1967, the Commissioners Court of Grayson County, Texas abolished the office of Justice of the Peace, Precinct 1, Place 2, Grayson County, Texas. In 1968 Relator was again a candidate for the office of Justice of the Peace, Precinct 1, Place 1, in the primary election of the Democratic Party held in May 1968. He was duly elected as the Democratic nominee. Thereafter he was elected to said office in the general election held in November 1968. The ballot in both the primary and general elections of 1968 did not contain the words "unexpired term" printed after the title to the Office of Justice of the Peace, Precinct 1, Place 1.* Thereafter in January 1969 Relator was sworn into said office and has continued to serve in said position since that time.

On January 13, 1969 the Office of the Secretary of State of Texas wrote Paul E. Lee, County Clerk of Grayson County, Texas, a letter concerning the office of

---

* V.A.T.S. Election Code, Art. 6.05d, provides:

"Whenever, in any general election or in any primary election for making nominations for a general election, an election is to be held for an unexpired term in an office, the words 'unexpired term' shall be printed after the office title on the official ballot."

the Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas. Therein it was stated, as the opinion of the Secretary of State, that in view of the abolition of the other justice precinct that Precinct 1, Place 1, was a "one-justice" precinct and that Relator had really been elected in 1968 to serve the unexpired portion of the regular term and that such term would expire December 31, 1970. After receipt of this letter Paul E. Lee, County Clerk, advised Respondent Charles E. Hughes that he would place the office of Justice of the Peace, Precinct 1, Place 1, on the ballot in the general election and that the County Chairman should do the same for the Democratic Primary. On Friday, January 30, 1970 Relator was informed by Respondent, acting in his capacity as Democratic County Chairman, that an election for the office of Justice of the Peace, Precinct 1, Place 1, Grayson County, would be held in the primary election of the Democratic Party to be held on May 2, 1970 and that if Relator desired to be a candidate for such office it would be necessary that he file his application as a candidate before the deadline for filing, to-wit, February 2, 1970. Respondent also advised Relator that one other candidate had already filed his application to be placed on the ballot. Thereafter, before the filing deadline other candidates filed their applications to be placed on the official ballot for said office.

Relator, through his attorney of record, requested Respondent not to place any names of candidates on the official ballot for the reason that Relator had been duly and legally elected in 1968 for a period of four years and such term would not expire until December 31, 1972. Respondent, acting upon information and opinion rendered to him by the County Clerk as well as the Secre-

tary of State of the State of Texas, and having no personal interest in the matter but acting solely in his official capacity, informed Relator that an election would be held for said office in the primary election of the Democratic Party and that all candidates who timely and properly filed their applications would be placed on the official ballot and that the winner would be the Democratic nominee for Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, in the general election to be held in November 1970. It is this action that Relator asks us to prevent.

We have jurisdiction of this matter pursuant to the specific provisions of Art. 1735a, Vernon's Ann. Civ. St. of Texas. The primary question to be decided is whether the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, is required to be filled by the 1970 general election of the State of Texas.

Respondent advances no legal argument for or against Relator's position, candidly stating that he is in no way personally a party to this suit and that in expressing his purpose to include the office in question on the Democratic Primary ballot on May 2, 1970 he was doing so in accordance with directives of the Secretary of State of the State of Texas who is designated as the Chief Election Officer of the State. He asks that we consider all of the law on the question in justice to all of the parties and that he will obey the mandate of the court. We commend Respondent for his attitude and the position he takes.

While Relator has supported his contention with several points we believe that the question presented is clearly and definitely answered by the plain and explicit provisions of the Constitution of the State of Texas.

Formerly justices of the peace of the State of Texas were elected for a two-year term. In 1954 Art. 5, Sec. 18

of the Constitution of the State of Texas, Vernon's Ann. St., was amended by the people so as to provide that the office of justice of the peace was converted from a two- to a four-year term. The same section of the Constitution provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two justices of the peace. It is stipulated that Precinct 1 of Grayson County, Texas contains a city, namely Sherman, which has more than 8,000 inhabitants.

In 1954 there were two justices of the peace in Precinct 1, and said offices continued until the abolishment of the office of Place 2, by order of the Commissioners Court in 1967.

In the same year, 1954, Art. 16, Sec. 65, of the Constitution of the State of Texas, was amended and the last paragraph thereof provided:

> "In any district, county or precinct where any of the aforementioned offices [including justices of the peace] is of such nature that two or more person hold such office, with the result that candidates file for 'Place No. 1,' 'Place No. 2,' etc., the officers elected at the general election in November, 1954, shall serve for a term of two years if the designation of their office is an uneven number, and for a term of four years if the designation of their office is an even number. *Thereafter, all such officers shall be elected for the terms provided in this Constitution.*" (Emphasis supplied.)

[1] By the plain provisions of this section of the Constitution the Justice of the Peace for Precinct 1, Place 1, Grayson County, Texas, would run for a two-year term in 1954. Then, in 1956 the term would become a four-year term, as provided by the provisions of Art. 5, Sec. 18,

of the Constitution, which would make the term expire in 1960. Thus, when Relator McGuire was elected in 1960 and in 1964 there was no question but that such terms were for a four-year period. The fact that the Commissioners Court of Grayson County abolished the Office of Justice of the Peace, Precinct 1, Place 2, in 1967, does not, in our opinion, have the legal effect of reducing the constitutional four-year term of Justice of the Peace, Precinct 1, Place 1, Grayson County to two years. The constitutional provision is clear and unambiguous that following the first two-year term of the uneven numbered office (as was Place No. 1) that thereafter, all justices of the peace would be elected for the term provided for in the Constitution, namely, four years. We hold that under such constitutional mandate the term of office to which Relator McGuire was elected in 1968 was for a period of four years, ending December 31, 1972.

[2, 3] It has been declared in many cases that a public office is property. 47 Tex. Jur. 2d, § 7, p. 18. This is certainly true in the sense that a person elected to an office established by law, and duly qualified for same by taking the oath of office, has a property right to the possession of the office and enjoyments of its rights and emoluments all of which the Constitution protects and the courts will enforce. State ex rel. Jennett v. Owens, 63 Tex. 261 (1885). Judge McGuire was duly and legally placed into possession of his office in 1968 for a constitutional term of four years. During that period he has the vested right and privilege to exercise the official duties of the office and to receive the compensation provided by law. Such may not be denied him by administrative edict or as a result of the Commissioners Court's action in abolishing another office in the same precinct.

To sanction such would open wide a Pandora's Box of uncertainty and confusion.

Accordingly, it is evident that the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, should not appear on the ballot of the Democratic Primary on May 2, 1970 and that a writ of mandamus should be and is here and now issued directing that Respondent Charles E. Hughes, as Democratic County Chairman of Grayson County, Texas, be directed to omit from the official ballot of the primary election of the Democratic Party in Grayson County, Texas to be held on May 2, 1970, the Office of Justice of the Peace, Precinct 1, Place 1, Grayson County, Texas, as well as the names of any candidates who filed an application with Respondent to have their names placed on the official ballot for such office.

Petition for writ of mandamus granted, as prayed.

EXHIBIT C

ARTICLE 16, TEXAS CONSTITUTION

§ 65. Transition from two year to four year terms of office

Sec. 65. Staggering Terms of Office—The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for "Place No. 1," "Place No. 2," etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for

a term of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. As amended Nov. 4, 1958.